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IN THE

Supreme Court of the United States

October Term 1974

NO.

THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA (SUCCESSOR IN INTEREST TO THE DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF GEORGIA), et al.,

Petitioners,

- v -

A. J. BURNHAM, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the Department of Human Resouces of the State of Georgia and Board of Human Resources of the State of Georgia (successors in interest to the no longer extant Department of Public Health and Board of Health of the State of Georgia)[1]; Richard M. Harden, Commis-

[1] Pursuant to governmental reorganization under Georgia's "Executive Reorganization Act of 1972," Ga. Laws 1972, pp. 1015-1068 (Ga. Code Ann. §§ 40-3501 to 40-35221), the Department and Board of Human Resources are now exercising the powers and functions of the former Department of Public Health and Board of Health of the State of Georgia. See, e.g. Ga. Laws 1972, pp. 1015,

missioner, Department of Human Resources (successor in interest to Dr. John H. Venable, Director, Department of Public Health); T. M. Jim Parham, Deputy Commissioner, Department of Human Resources (successor in interest to Dr. Elton Osborne, Deputy Director, Department of Public Health); Dr. W. Douglas Skelton, Director, Division of Mental Health, Department of Human Resources (successor in interest to Dr. Addison Duval, Director, Division of Mental Health, Department of Public Health); Mr. Jack H. Watson, Jr., Chairman, Dr. Joseph Turner and Dr. Donald Pittard, members of the Board of Human Resources, and all other members of the Board of Human Resources, jointly and severally, who are similarly situated (successors in interest to Dr. Lamar Peacock, Dr. M. Freeman Simmons, Dr. Beverly W. Forester, and the other similarly situated members of the no longer extant Board of Health of the State of Georgia); Dr. John Gates, Superintendent, Central Georgia Regional Hospital at Central State Hospital (successor in office to Dr. James Craig); Dr. Eugene C. Jarrett, Director, Southwestern State Hospital (successor in office to Dr. Norman B. Pettit); Dr. Lawson H. Bowling, Director, Georgia Regional Hospital at Atlanta; Dr. James Craig, Director, Georgia Regional Hospital at Savannah (successor in office to Dr. Ilhan Ermutlu); Dr. Everett C. Kuglar, Director, Georgia Regional Hospital at Augusta; Dr. Norman D. Pursley, Director Gracewood State Hospital; Honorable Eugene Gunby, Judge, Court of Ordinary of Fulton County, Georgia, and Honorable Marion Guess,

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1070-1072 (Ga. Code Ann. §§ 40-35123.1 to 40-35123.3). Pursuant to Rule 48(3) of this Court we have similarly substituted the names of certain successors in office for the originally named office-holder defendants. The original complaint expressly lists "all . . . successors in each office" as defendants.

Jr., Judge, Court of Ordinary of DeKalb County, Georgia (successor in office to the Honorable Katherine Mann); and all other judges of the courts of ordinary of Georgia, jointly and severally who are similarly situated; respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 8, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335 (N.D. Ga. 1972). The *per curiam* opinion of the Court of Appeals for the Fifth Circuit reversing the district court's decision, rendered on November 8, 1974, is not yet reported. Both opinions are set forth in the appendix hereto, as is the unreported decision of the Court of Appeals in the companion case of *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided November 8, 1974).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 8, 1974, and this petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

On October 21, 1974, this Honorable Court granted certiorari to review a decision of the Court of Appeals for the Fifth Circuit on the question of whether there is a

constitutional right to treatment for persons involuntarily committed to state mental institutions. *See Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *cert. granted*, __U.S.__, 42 L.Ed.2d 138 (October 21, 1974). The present case presents a logical progression from this threshold issue of *Donaldson*. Here the controversy is not one of "treatment" versus "no treatment", but of whether where therapeutic or curative treatment beyond custodial care concededly is being given, it must also be given according to some *constitutionally prescribed dosage*. As the district court put it: "Plaintiffs [here the Respondents] do not assert that 'treatment' is not being provided in the Georgia mental health facilities, but that the 'adequacy' (*i.e.* quality, quantity, individualization, and level) of treatment is deficient and that 'adequate treatment' is mandated by the constitution of the United States." *See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1339, n. 7 (N.D. Ga. 1972). To Petitioners (Defendants below), the district court's dismissal of the action was anticipated, the Court of Appeals' reversal was not. The precise issues presented to this Court for review are:

1. Whether persons committed to state mental institutions have not only *a federal constitutional right* to therapeutic or curative psychiatric treatment, but also have *a federal constitutional right* to some particular level, degree or measure (quantitatively and qualitatively) of such treatment.

2. Whether it is consistent with the Eleventh Amendment for a federal district court to entertain a suit by private individuals which would require a state to reorder its priorities and increase its level of fiscal support

for the therapeutic or curative psychiatric treatment it provides in its mental institutions.

3. Whether Respondents claim of a right to some unspecified dosage of therapeutic or curative psychiatric treatment for a class consisting broadly of all mentally disabled persons in a state's mental institutions presents a justiciable controversy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amend XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U. S. Constitution, Amend XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Ga. Code Ann. § 88-502.3. *"Quality of care and treatment—*

(a) Each patient in a facility and each person receiving services for mental disorders shall receive care and treatment that is suited to his needs and such care and treatment shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. In order to assure proper care and treatment, the superintendent of a facility shall require that each patient receive such medical attention as his condition demands and that, unless the patient or his representatives consent in writing, no treatment shall be given which is not recognized as standard psychiatric treatment.

(b) If a patient hospitalized under the provisions of

this Chapter is able to secure the services of a private physician, he shall be allowed to see his physician at any reasonable time. The superintendent is hereby authorized and directed to establish regulations designed to facilitate examination and treatment which a patient may request from such private physician.

(c) Every patient admitted to a facility under the provisions of this Chapter shall be examined by the staff of the admitting facility as soon as possible after his admission."

Ga. Code Ann. § 88-502.11. *"Judicial supervision—*

(a) At any time and without notice, a person detained by a facility or a relative or friend on behalf of such person may petition, as provided by law, for a writ of habeas corpus to question the cause and legality of detention and to request the court on its own initiative to issue a writ for release.

(b) A patient or his representatives may file a petition in the court of ordinary in the county where the patient is hospitalized, alleging that the patient is being unjustly denied a right or privilege granted by this Chapter or that a procedure authorized by this Chapter is being abused. Upon the filing of such a petition, the court shall have the authority to conduct a judicial inquiry and to issue any appropriate order to correct any abuse of the provisions of this Chapter."

Ga. Code Ann. § 88-506.1. *"Criteria for non-objecting or involuntary hospitalization—*

A person being within the State may be hospitalized under sections 88-506.2 through 88-506.7 if he is mentally ill and is (a) likely to injure himself or others if not hospitalized or (b) incapable of caring for his physical health and safety."

Ga. Code Ann. § 88-507.1. *"Criteria for judicial hospitalization—*

A person may be hospitalized under sections 88-507.2 and 88-507.3 if he is mentally ill, and he is (a) likely to injure himself or others if not hospitalized or (b) incapable of caring for his physical health and safety."

STATEMENT OF THE CASE

The State of Georgia is not an ogre. It desires the best possible care and treatment for persons confined to its mental institutions. It is the State's declared policy that "no person shall be denied care and treatment for mental disorder," and that an individual's right to the same shall not be delayed because of his inability to pay. See Ga. Code Ann. § 88-502.2. Nor is Georgia's commitment to the proposition one which ends with its simple recognition as a moral obligation. It is a legal "right" which is expansively guaranteed by State law. As the district court aptly noted, Georgia, in 1969, enacted detailed legislation which ". . . has been heralded as one of the most advanced statutory treatments of the subject of hospitalization of the mentally ill in this nation. See Ga. Laws 1969, pp. 505-545; Ga. Code Chapt. 88-5." *See Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1337 (N.D. Ga. 1972). With an abundance of "due process" protections,[2] the Act provides for both voluntary and involuntary hospitalization of persons suffering from mental illness. Indeed that portion of the 1969

[2]Notice of the right to hearing with aid of counsel (court appointed if the patient cannot afford to retain counsel) is required not merely once, but at multiple stages of the commitment procedure, *e.g.,* Ga. Code Ann. §§ 88-504.6, 88-505.3, 88-506.3, 88-506.6, not to mention a continuing right, exercisable at any time and without notice, to seek release through application for a writ of

Act which is popularly referred to as the "bill of rights for the mentally ill" goes far beyond those basic rights asserted by Respondents (plaintiffs below).[3] To illustrate, in paragraph 2 of their complaint, Respondents mention the necessity of providing: (1) "a humane psychological environment", (2) "a qualified staff in numbers sufficient to administer adequate treatment", and (3) "individualized treatment plans for each patient." [A. 7][4] But what do the Respondents say here that Georgia law doesn't already require in even greater abundance? Ga. Code Ann. § 88-502.3(a), for example, provides that:

> "(a) Each patient in a facility and each person receiving services for mental disorders shall receive care and treatment that is suited to his needs and such care and treatment shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. In order to assure proper care and treatment, the superintendent of a facility shall require that each patient receive such medical attention as his condition demands and that, unless the patient or his representatives consent in writing, no treatment shall be given which is not recognized as standard psychiatric treatment."

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habeas corpus. Ga. Code Ann. § 88-502.11. See also, Ga. Code Ann. § 88-502.12. The complaint filed in this case did not suggest any "due process" defects in connection with Georgia's commitment procedures.

[3]See Ga. Laws 1969, pp. 505, 508, *et seq.* (Ga. Code Ann. §§ 88-502.1 *et seq.*). In addition to the general protection of all civil, political, personal and property rights, Ga. Code Ann. § 88-502.1, protection is extended to communications (Ga. Code Ann. § 88-502.5), voting rights (Ga. Code Ann. § 88-502.7), the right to legal counsel (Ga. Code Ann. § 88-502.12), and the patient's attorney's access to the physicians who have attended him (Ga. Code Ann. § 88-502.17).

[4]Designations as [A. 7] refer to the Appendix as printed for the Court of Appeals for the Fifth Circuit.

The rights of the mentally disabled in Georgia are readily enforceable through State judicial remedies also provided by the Act. See, e.g. Ga. Code Ann. §§ 88-502.11 and 88-502.16.

The district court also took note of the fact that Georgia's commitment to progress in the area of care for the mentally disabled is further reflected in the difficult but essential area of fiscal support, with an increase in the General Assembly's appropriations from $13,000,000.00 in 1960 to the $90,000,000.00 level in 1972. *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337 (N.D. Ga. 1972).[5] The level of effort which the State makes in the area of public health generally (including although not limited to mental health) can be seen in the Research Report 1972-R1 of the Research Division of the National Education Association, entitled "Rankings of the States, 1972", pp. 34 (table 55) and 56 (table 97). The Report shows that while a relatively poor State in terms of per capita income, ranking 34th in the Nation in this respect during 1970, it stood 4th in the Nation in per capita expenditures for public health and hospitals.

This is not to say that there is not considerable room for improvement, or that no problems, faults or factual deficiencies exist. The nationwide shortage of medical professionals, particularly acute, for example, with respect to Registered Nurses, obviously affects public as well as private hospitals in Georgia just as it does elsewhere. Then too, since there has at times been an actual waiting list of individuals seeking *voluntary* admission to the State's

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[5]Although not a part of the record it is of interest to note that State funding for the care and treatment of the mentally disabled has now reached the $160,000,000.00 level.

mental institutions, it is not surprising to find that some overcrowding has resulted precisely because of the State's commitment to the right of the mentally disabled to diagnosis, care and individualized treatment. In attempting to meet these problems, the State has, among other things, undertaken to construct a number of regional hospitals as well as to develop community mental health programs. Thus the number of patients at the state's most overcrowded hospital, Central State Hospital at Milledgeville, Georgia, had been reduced from a peak of about 12,000 to around 7,400 at the time the present suit was filed.[6]

Rather than applauding this background of effort as did the district court,[7] the Atlanta chapter of the American Civil Liberties Union, in sponsoring this suit, apparently took the view that since a United States District Court in Alabama had been persuaded to discover or create *a federal constitutional* right to therapeutic psychiatric treatment in that State, *see Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards*, 334 F.Supp. 1341 (1971), *enforced*, 344 F.Supp. 373 (1972), it should hasten to achieve the same result in Georgia. Totally ignored were the substantial factual disparities between the two states in connection with the care and treatment of the mentally disabled, many of which were matters of public record.[8]

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[6]The Division of Mental Health of the Department of Human Resources advises that the present number of mentally disabled patients at Central State Hospital is 5,354.

[7]*See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337-38 (N.D. Ga. 1972).

[8]Prior to the Court of Appeals' decision even a "case comment" favorable to *Wyatt* and critical of *Burnham* conceded that there were grounds upon which the differing district court decisions could both be affirmed upon appeal. *See* 86 Harv. L.Rev. 1282,

In filing their action on March 29, 1972, Respondents invoked the district court's jurisdiction under the "civil rights" statutes, 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. 1343(3) and (4), to redress claimed deprivations under color of State law, of rights, privileges and immunities said to be secured by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States [A. 4-5]. Respondents prayed for both injunctive relief and for a declaratory judgment under 28 U.S.C. § 2201. As the district court noted, the suit, brought as a "class action", was predicated upon the contention that the United States' Constitution not only secures a right to persons confined to State mental institutions to receive psychiatric treatment, but further guarantees that the treatment shall be *"constitutionally* adequate and effective treatment", or, as otherwise stated in the complaint *"constitutionally* adequate diagnosis, care, and treatment of patients." [A. 7-9]; *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337 (N.D. Ga. 1972) [emphasis by the district court].

In response, Petitioners (the Defendants below) filed defensive pleadings which, in addition to generally denying the factual allegations of the complaint and setting forth certain affirmative defenses, contained several motions to dismiss. These motions were based upon lack of

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1284, n. 11 (1973). In *Wyatt*, for example, there was evidence of severe *physical* health and safety deficiencies, including malnutrition, insect infestation and generally unsanitary conditions. *See Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In *Burnham*, Respondents have not claimed the existence of any such physical deprivations or inadequacies in Georgia's institutions. To the contrary, the allegation in their complaint that in some cases "the care and treatment is deficient to the extent that it amounts only to custodial care" [A. 7], coupled with the complete absence of any attack upon the quality of the custodial care as such, seems to us to be at least an implied con-

jurisdiction (i.e. the absence of a "substantial" federal question), the Eleventh Amendment, the failure of the complaint to present a "justiciable issue", and its general failure to state a claim upon which relief could be granted [A. 10-11]. Petitioners additionally moved the court to dismiss the complaint as a "class" action.

Upon consideration of the pleadings, the extensive briefs submitted by the parties, and certain of the factual considerations already referred to (which being matters of public record were susceptible of judicial notice), the district court entered its order dismissing the complaint on August 4, 1972. *See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335 (N.D. Ga. 1972). Respondents appealed to the United States Court of Appeals for the Fifth Circuit and the case was argued before that court on December 6, 1972, immediately following argument of related issues in the appeal taken by the Alabama defendants in *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ga. 1971), *on submission of proposed standards*, 334 F.Supp. 1341 (1971), *enforced*, 344 F.Supp. 373 (1972).

Almost two years later, after having held for the first time in yet another case of this same genre that persons involuntarily committed to state mental hospitals *do* have a *federal constitutional* right to therapeutic or curative psychiatric treatment (*i.e.* "a constitutional right to such treatment as will help him to be cured or to improve his mental condition"), *see Donaldson v. O'Connor*, 493 F.2d 507, 527 (5th Cir. 1974), *cert. granted*, ___U.S.___, 42, L.Ed.2d 138 (October 21, 1974), the Court of Ap-

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cession that the level of custodial care is not in itself deficient. Certainly no claim to the contrary was presented to the district court.

peals entered its decisions in both *Wyatt* and *Burnham*. In *Wyatt* that court reaffirmed the existence of the *constitutional* right to treatment it had adopted in *Donaldson*. *See Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In *Burnham* it simply entered a two sentence *per curiam* order reversing the decision of the district court on the authority of its decisions in *Donaldson* and *Wyatt*, and remanded the case for further proceedings consistent with the principles it had announced in those decisions. *Burnham v. The Department of Public Health of the State of Georgia*, __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974). It did this notwithstanding the differing factual situation involved in *Burnham* to which we have already referred, and notwithstanding the presence of the additional and we think important legal consideration arising from the fact that the claimed "rights" in *Burnham* go beyond the basic threshold issue of a federally guaranteed right to *some* therapeutic or curative psychiatric treatment beyond custodial care, and seek to *constitutionally* prescribe some unknown (and we would indeed say unknowable as well) "dosage" of such treatment. For reasons we shall go into, we believe that this imposition upon the States of a new *constitutional* obligation to not only render psychiatric treatment, but to render that precise level or amount which a given federal judge may be induced to believe is sufficient or adequate, is worthy of this Court's review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE CONSTITUTION REQUIRES STATES TO PROVIDE THERAPEUTIC PSYCHIATRIC TREATMENT FOR PERSONS COMMITTED TO THEIR MENTAL INSTITUTIONS, AND IF SO, WHETHER THE CONSTITUTION PRESCRIBES A PARTICULAR DOSAGE OF TREATMENT

Traditionally, decisions as to (1) what governmental services and benefits a State should provide, and (2) the ordering of priorities and fiscal support levels for those which are provided, are left to the several States. *Cf. Fullington v. Shea,* 320 F.Supp. 500, 506 (D. Colo. 1970) [three-judge district court], *aff'd,* 404 U.S. 963 (1971); *Dandridge v. Williams,* 397 U.S. 471, 485-487 (1970); *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). Such decisions are indeed what State government is all about, involving as they do the clash of divergent political ideologies and philosophies on the subject of how the invariably inadequate state tax funds should be allocated and spent. If Respondents are correct in this case, if they are entitled to have federal courts inquire into, second guess and supervise the measure, level and degree of curative psychiatric treatment which the State provides for the mentally disabled in State mental institutions, one may well wonder how or why the situation could be any different with respect to the quality and quantity of the curricula and instructional services provided for children attending schools under the State's compulsory atten-

dance laws, or, for that matter, with respect to the rehabilitative services provided for persons incarcerated in state prisons? Since we are all confined to our social environment, it would also have to be asked why suits based upon alleged "constitutional inadequacies" in the quantity or quality of police protection, public welfare, or sanitation should be any different.

The important policy question in this case, in other words, is whether there is to be *a new federal constitutional right* (whether ascribed to "creation", "discovery", "recognition" or otherwise) which would not only require a state to make a particular public program, benefit or service available to a particular class of persons, but which would require the program, benefit or service to be provided at that particular level (and with that particular degree of state fiscal support) thought to be sufficient or adequate by someone other than the people who foot the bill and their elected representatives. Again we reach the ultimate question of political life—who decides? In the case at bar the question must be asked and answered at two levels. First of all there is the threshold question of whether there is a *federal constitutionally guaranteed* right to psychiatric treatment for mentally disabled persons confined to State mental institutions. Secondly, assuming an affirmative answer to this initial question, does the constitution further prescribe any particular dosage of curative treatment which the State is obliged to provide.

1. *A federally guaranteed right to psychiatric treatment?*

In urging the district court to recognize a constitutionally guaranteed "right to treatment" for persons confined to state mental institutions, Respondents conceded that their position was "somewhat in the forefront of the law." *See Burnham v. The Department of Public Health of the*

State of Georgia, 349 F.Supp. 1335, 1338 (N.D. Ga. 1974). Respondents concession, with which the district court agreed, was well-founded. As recently as 1969, Dr. Morton Birnbaum, who for at least fifteen years has been one of the leading exponents of the creation of a constitutional right to adequate psychiatric treatment for the mentally ill, acknowledged that while the right had been accepted by society, it had *not* been recognized as a *federal constitutional right.* See Morton Birnbaum, M.D., LL.B. *The Right to Treatment—Some Comments on Certain Legal Developments,* pp. 3, 24 (Statement read on Nov. 4, 1969, before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate).[9] Although the District Court in the Northern District of Georgia and the Court of Appeals for the Fifth Circuit arrived at differing conclusions on the advisability of venturing forth on the new trail, there is no question as to the fact that both courts agreed that it was indeed a *new* trail that was being blazed. Both courts acknowledged that prior to decision of the district court for the Middle District of Alabama in *Wyatt v. Stickney,*[10] the courts had not gone beyond recognizing a statutory right to treatment in those jurisdictions where such a right exists.[11] In the

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[9]Dr. Birnbaum's statement is set forth in its entirety in the "Exhibit Volume" which Petitioners filed with the Court of Appeals.

[10]325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards,* 334 F.Supp. 1341 (1971), *enforced,* 344 F.Supp. 373 (1972), *aff'd in part, remanded in part, and rev'd in part, sub. nom. Wyatt v. Aderholt,* __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974).

[11]*See Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1339 (N.D. Ga. 1972), *rev'd,* __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974), and *Donaldson v. O'Connor,* 493 F.2d 507, 519 (5th Cir. 1974). In *Donaldson,* after observing that it was the first court of appeals to which the question had been addressed, the Court of Appeals for

District of Columbia, for example, the Court of Appeals, in a series of split decisions, held that by virtue of a specific federal statute pertaining to the hospitalization of the mentally ill in Washington, D.C., it was appropriate for the judiciary to go into the matter in that jurisdiction. *See Covington v. Harris*, 419 F.2d 617, 623-625 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966). It is true that Chief Judge Bazelon, speaking for the majority of the court in *Rouse*, also indicated by way of *dicta* that he considered a lack of psychiatric treatment beyond custodial care to raise serious constitutional issues. But we think it significant to point out that he did so in the context of commitments for an indefinite period of time *without* the procedural safeguards of a full civil commitment proceeding and solely by virtue of a statute requiring the same where an individual was acquitted of a crime "by reason of insanity" (*i.e.* a legislative reaction to the "Durham Rule"). Judge Bazelon expressly noted that this issue had not been reached by the court because Congress had provided by statute for a right to treatment within the District of Columbia above and beyond custodial care. See *Rouse v. Cameron*, 373 F.2d *supra* at p. 455.

An example of the traditional judicial approach to at-

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the Fifth Circuit referred to two post *Wyatt v. Stickney* decisions which had followed the district court's conclusion in that case that there was a *constitutional* "right to treatment", *i.e. Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) and *Stachulak v. Coughlin*, 364 F.Supp. 686 (N.D. Ill. 1973). Another recent case has apparently rejected the *Wyatt* view, holding that while mentally retarded persons in state institutions have a right to reasonable "protection from harm", they do *not* have a "right to treatment." *See New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973).

tempts to elevate the undoubted moral right to psychiatric treatment to a level of a *federal constitutional* guarantee is seen in *People of the State of New York ex rel. Anonymous v. La Burt,* 218 N.Y.S. 738, 739 (1961). In holding that the fact that New York had a policy of caring for and attempting to cure the mentally ill did not create a right to release in the event of alleged inadequate treatment, the Appellate Division of New York's Supreme Court said:

> "Jurisdiction is inherent in the State over persons within its limits who have been deprived of the use of their mental faculties. It is the duty of the State to protect the community and the mentally ill from their own acts. A mentally ill person may be deprived of his liberty and, if once adjudged to be insane, that person has been deprived of no constitutional right, State or Federal * * *. Commitment for an indefinite time is legal where, as here, the statute makes provision for the mentally ill person to contest, by proof of his sanity, the legality of his confinement after admission * * *."
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> "It is the policy of the State to care for and protect mentally ill persons and, if possible, to cure them of disease * * *. *But this policy does not confer on the mentally ill person a right to release in the event of claimed inadequate treatment.*" (italics added.)

When Petitioner subsequently appealed to this Court, his appeal was dismissed upon motion and treated as a writ for certiorari the petition was denied. *See New York ex rel. Anonymous v. La Burt, State Hospital Director,* 369 U.S. 428 (1962). This Court has similarly declined to review a number of other lower court rejections of the contention that there is a *constitutional* right to treatment. *See. e.g. Donaldson v. O'Connor, State Hospital Superin-*

tendent, 390 U.S. 971 (1968); *New York ex rel. Anonymous v. La Burt, State Hospital Director*, 385 U.S. 936 (1966); *Stephens v. La Burt, State Hospital Director*, 373 U.S. 928 (1963); *see also In re Donaldson*, 364 U.S. 808 (1960).

As we see it, one of the more critical flaws in the Court of Appeals for the Fifth Circuit's analysis of the matter stems from its view that the *only* constitutional justification for civil commitment of the mentally ill is curative treatment (which the Court of Appeals refers to as a *quid pro quo* necessary to justify civil confinement). *See Donaldson v. O'Connor*, 493 F.2d 507, 519-524 (5th Cir. 1974); *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974). The trouble with this premise is that psychiatric treatment has until now not been thought of as being even the *primary*, much less the *only* permissible justification for confinement of mentally ill persons. The principal justification (and as we see it a constitutionally adequate justification) has historically been avoidance of the injury which the afflicted individual is likely to do to others or himself if he is not confined. *See, e.g.* Ga. Code Ann. §§ 88-506.1, 88-507.1; *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953); 41 Am.Jur.2d, *Incompetent Persons* § 34; 44 C.J.S. *Insane Persons* § 64.

The *"quid pro quo"* rationale used by the Court of Appeals for the Fifth Circuit to justify its creation of a new constitutional right to psychiatric treatment also seems to be contrary to what this Court has had to say about the matter. In *Greenwood v. United States*, 350 U.S. 366, 375 (1956), for example, the court seems to have recognized "avoidance of injury" as an adequate basis for commitment. It said:

> "The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States . . . ."
>
> "The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner."

In his concurring opinion in *Robinson v. California*, 370 U.S. 660, 668-669 (1962), Justice Douglas, nothing that insanity is a disease, similarly pointed out that:

> " . . . afflicted persons may be confined *either* for treatment *or* for the protection of society, they are not branded as criminals." (italics added).[12]

And in *Jackson v. Indiana*, 406 U.S. 715, 727-732 (1972), the Court, although more directly concerned with commitment procedures, thoroughly analyzed both conceivable justifications for commitment (*i.e.* attempted curative treatment or custodial care so as to avoid injury to others), without the slightest suggestion that either would in the absence of the other be constitutionally inadequate.

Finally, no one appears to dispute the fact that *if* the constitution now confers a right to therapeutic or curative psychiatric treatment for mentally ill persons committed to State institutions (*i.e.* treatment beyond custodial care), the right unquestionably is a new one. Yet this Court has quite recently pointed out in an area of at least as great

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[12]A similar use of the disjunctive rather than the conjunctive is seen in the dissent of then Judge Burger in *Lake v. Cameron*, 364 F.2d 657, 663 (D.C. Cir. 1966), when he spoke of "treatment *or* custodial care" for the mentally ill. We think that here, as in the concurring opinion in *Robinson v. California, supra*, the use of "or" was not inadvertent.

societal concern and importance, public education, that it is not the province of the courts to create substantive constitutional rights under the Fourteenth Amendment's "equal protection" clause. *See San Antonio School District v. Rodriquez*, 411 U.S. 1, 33 (1973). We would suggest that the same reluctance to create a new substantive constitutional right ought to obtain under the "due process" clause in the case at bar. We agree that the furnishing of psychiatric treatment in State mental institutions *to those who might benefit from it* is important. So is public education and many of the other services which the State provides for particular classes of its citizens. But as this Court explained in *Rodriquez*, it is not the importance of a state service which determines whether it is "fundamental" in the sense of being among those rights and liberties protected by the Constitution, but whether the right is:

> "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at pp. 33-34.

Obviously the right to psychiatric treatment is not among those rights "explicitly" protected by the Constitution. Nor do we think it is "implicitly" guaranteed. At the very least we submit that any imposition of this new and quite substantial constitutional obligation upon the States on the theory that it is "implicitly" guaranteed is sufficiently novel as a constitutional proposition to justify this Court's review and determination of the matter. Particularly is this so where critical federal-state relations are involved (*federal* judicial supervision of *state* mental institutions and the probable reordering of *state* determined allocations and expenditures of *state* tax funds), and where the decision of the Court of Appeals appears to be in conflict with what this Court has had to say on the matter.

2. *A particular dosage of curative treatment?*

Even were it to be decided that persons committed to state mental institutions are entitled to therapeutic psychiatric treatment *as a matter of federal constitutional law*, it would still be a rather considerable jump from the position that the courts must see to it that *some* therapeutic or curative treatment be given, to that of requiring the courts to supervise and second guess state officials with respect to the "adequacy" (*i.e.* measure, level, quality, quantity and individualization) of such treatment above and beyond reasonable custodial care. We think that the difference may well be what then Judge Burger had in mind when he said in his concurring opinion in *Dobson v. Cameron*, 383 F.2d 519, 523 (D.C. Cir. 1967):

> "I have grave doubts that we are qualified to oversee mental hospitals in cases of civil commitment but, at the least, there is some statutory basis on which it can be argued that Congress has conferred some power on us at least to inquire into civil commitment cases when it is alleged that one is being detained *without any* treatment." [Emphasis by Judge Burger.]

The same thought similarly appears in his dissenting opinion in *Lake v. Cameron*, 364 F.2d 657, 663 (D.C. Cir. 1966):

> " . . . this Court now orders the District Court to perform functions normally reserved to social agencies *by commanding search for a judicially approved course of treatment* or custodial care for this mentally ill person who is plainly unable to care for herself. Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved." (italics added).

Yet far more germane to the question at hand, which is whether the change of course in constitutional law by the Court of Appeals for the Fifth Circuit in the case at bar is worthy of review by the Supreme Court of the United States, is the fact that in directing district courts to henceforth adjudicate questions concerning the "adequacy" or "dosage" of curative psychiatric treatment in state mental institutions, the Court of Appeals seems to be at odds with this Court's dismissal of the appeal taken from the Supreme Court of New Mexico's decision in *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969). There a petitioner had asked the state courts to judicially inquire into the question of whether or not he was being given the least restrictive course of treatment possible—this, of course, being one important facet of the many-sided question of the "adequacy" of psychiatric treatment. In flatly rejecting petitioner's contention that his constitutional rights were being violated, the Supreme Court of New Mexico expressly declared that it agreed with the dissent of then Judge Burger in *Lake v. Cameron, supra.*, which as we have already seen was based upon the lack of wisdom of commanding a district court to search for "a judicially approved course of treatment or custodial care" for the mentally ill. Upon appeal, this Honorable Court entered the following *per curiam* order: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." *Sanchez v. New Mexico*, 396 U.S. 276 (1970). It is our understanding that such a *per curiam* dismissal is a decision on the merits. *See e.g. Ohio ex rel. Eaton v. Price, Chief of Police*, 360 U.S. 246, 247 (1969) [separate memorandum opinion of Justice Brennan]; *Ahern v. Murphy*, 457 F.2d 363, 364 (7th Cir. 1972). Presumably it is therefore binding upon lower federal courts to the extent that it deals

with the "adequacy of treatment" question in the context of evaluating alternative courses of curative psychiatric treatment to see which is "least restrictive." We respectfully submit there is neither a logical nor a legal reason to distinguish between this particular facet of "adequacy" and the problem of "adequacy" in general (*i.e.* the overall level, measure, degree or dosage of psychiatric treatment). Judicial involvement in either situation leads to the search for "a judicially approved course of treatment." Thus even if it could be said in the first instance that mentally ill persons in state mental institutions are entitled to therapeutic psychiatric treatment as a matter of federal constitutional law, the Fifth Circuit's command to the district courts to take a step beyond seeing merely that *some* psychiatric treatment is given and to further require that the treatment be given according to some judicially prescribed conception of "adequacy", is contrary to *Sanchez*. While we think the importance of the constitutional question involved in and of itself merits its being passed upon by this Court, review is additionally called for because of the fact that the decision of the Court of Appeals for the Fifth Circuit in this case is in apparent conflict with this Honorable Court's dismissal of the appeal in *Sanchez* "for want of a substantial federal question."

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER IT IS CONSISTENT WITH THE ELEVENTH AMENDMENT FOR A FEDERAL DISTRICT COURT TO ENTERTAIN A SUIT BY PRIVATE INDIVIDUALS WHICH WOULD REQUIRE A STATE TO REORDER ITS PRIORITIES AND INCREASE THE LEVEL OF ITS FISCAL SUPPORT FOR THE THERAPEUTIC PSYCHIATRIC TREATMENT IT PROVIDES IN ITS MENTAL INSTITUTIONS.

When all is said and done, what Respondents are asking the federal courts to do is to require the State of Georgia (and presumably all other states) to spend more of their tax dollars for the "diagnosis, care and treatment" of mentally disabled persons in state mental institutions. They insist that they have a *federally* enforceable right to increase the quantity and quality of psychiatric treatment in these *state* institutions to that particular level which they consider to be acceptable (i.e. "constitutionally adequate"). In the absence of the presumably unthinkable "solution" of simply turning mentally disabled persons out of state institutions without any treatment (or even custodial care) whatsoever, this necessarily means either higher taxes or the reordering of legislative priorities as to public expenditures. The United States Court of Appeals for the Fifth Circuit recognized but did not appear to be overly bothered by this problem in *Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In noting the Governor of Alabama's argument that based upon the then existing number of mentally disabled persons in that state's mental institutions, the prescribed

remedy would entail an expenditure annually of a sum equal to 60% of the State budget, the Court of Appeals observed only that "any federal decree that state lands be sold or legislative appropriations be reallocated or enjoined would involve state laws of statewide significance" and that the federal injunctive decree "which might be entered" would have to be entered by a three-judge district court. See Appendix, p. 46a. While disclaiming any prejudgment as to the appropriateness of such relief in the case before it (the Court of Appeals thought that depending upon the improvements made such remedies might prove to be unnecessary), its opinion left little doubt as to its belief that such remedies were available to federal district courts as ultimate compliance weapons. Thus in the case at bar it reversed the Georgia district court's decision that it would not "require the State of Georgia to expend additional revenues for the diagnosis, care and treatment of patients in its mental institutions" because "[t]o place such a requirement upon the State, under the circumstances wherein citizens of the State have brought action in federal court, would be in contravention of the Eleventh Amendment to the United States Constitution." See *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1341 (N.D. Ga. 1972), rev'd, __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974).

We think that the Eleventh Amendment analysis of the district court in this case was plainly correct and that that of the Court of Appeals is plainly wrong. But even plainer, we think, is the fact that the assertion of such an extreme and unprecedented power of federal judicial control over the governmental priorities and budgetary allocations of state legislatures should not be permitted as

being consistent with the Eleventh Amendment without this Court's consideration of the matter and its implications for the federal-state relationship.[13]

In contending that the Eleventh Amendment problem is one which should be passed upon by this Honorable Court and also that its disposition by the Court of Appeals is in apparent conflict with applicable decisions of this Court, we do not overlook the fact that the Court has pointed out that the Eleventh Amendment is not always violated simply because a decree entered against a state official causes him to spend more money (ultimately from the state treasury) than would have been the case had he been left to his former method of operations—"[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

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[13]One of the dangers involved in the transfer of control over the level or measure (i.e. "adequacy") of *state* health or welfare programs (which inevitably involves the ordering of priorities and funding) to *federal* officials (judicial or otherwise) is the strong inducement it presents to the state to water down or even wholly abandon its program. As the district court so perceptively observed:

> "All too often, the instance of judicial overreach can result in a reduction of governmental services to a minimal level for fear of subsequent accountability for some innovative beneficial program. The rigidity of the court process can often stifle intelligent experimentation in dealing effectively with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced." *Burnham v. The Department of Public Health of the State of Georgia*, 349 F. Supp. 1335, 1343-1344 (N.D. Ga. 1972).

Do Respondents really think that persons committed to, or who have voluntarily been admitted to (about 50%), Georgia's mental institutions will be better served if they are deprived of *all* institutionalized care and treatment and set at large where they can demonstrate their inability to cope with society? We hope not. Yet compliance with the extraordinary sort of order which the Alabama

But while it may to some extent be a matter of degree, we simply cannot believe that a suit by a state's citizens which goes to the heart of what state government is all about — which would both restructure priorities for state programs and substantially revise state budgets — can, if the Eleventh Amendment is to have any practical meaning, be authorized on the ground that this would be a mere "ancillary effect." This Court has long since held the Eleventh Amendment cannot be so easily circumvented and that raids on the state treasury are not to be condoned simply because they are launched against state officials rather than the state itself. See, e.g. *In re Ayers*, 123 U.S. 443, 487-492 (1887).[14] As this Court has so many times pointed out, the applicability of the Eleventh Amendment in suits brought against state officials "is to be determined by the essential nature and effect of the proceeding." *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

In the case at bar we do not believe there is any disagreement at all over the fact that the "essential nature and effect of the proceeding" is to require the State of

district court entered in *Wyatt* respecting staffing requirements could easily lead to this result when the decreed numbers of a particular discipline (e.g. registered nurses, nurse therapists, etc.) simply are not available in the numbers required by the court.

[14]In the case at bar Respondents named a state department and a state board as defendants *eo nomine*, as well as naming a substantial number of the state officials responsible for the administration of affected State agencies and institutions. Although the Court of Appeals did not deal specifically with this issue, we assume that to the extent that it is a suit against these state agencies *per se*, there is no real question as to the fact that it must be dismissed. *See, e.g. Edelman v. Jordan*, 415 U.S. 651, 662-665 (1974); *Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 280 (1973); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Georgia to restructure its priorities and spend more money for the diagnosis, care and therapeutic psychiatric treatment of the mentally disabled in its mental institutions. Certainly this is the view which the Court of Appeals took of the matter in *Wyatt* [whose "principle" the Georgia district court has been directed to follow in the case at bar]. Yet this seems to be precisely the sort of thing which this Court, as early as *In re Ayers*, 123 U.S. 443, 492 (1887), considered to be among the evils the Eleventh Amendment was designed to prevent. After referring to the propriety of a court's exercise of jurisdiction in a suit against state officers where the state had waived their immunity, this Court stressed the fact that this was quite different from:

> " . . . authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State." *Ibid.*

Moreover, the necessary reordering of priorities for public services established by the state legislature would seemingly in and of itself be contrary to this Court's recognition that a state is not to be controlled in the making or carrying out of its *political* decisions in such matters. *Cf. Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 51 (1944); *Fullington v. Shea*, 320 F.Supp. 500, 506 (D. Colo. 1970) [3-judge district court], *aff'd*, 404 U.S. 963 (1971). Viewed in light of its "essential nature and effect" we cannot imagine a case any more obviously "against the State" than the case at bar. We think its dismissal by the district court on Eleventh Amendment grounds was proper and that the district court's decision should have been affirmed by the United States Court of Appeals for the Fifth Circuit.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A SUIT BROUGHT AS A CLASS ACTION TO REQUIRE A STATE TO PROVIDE "ADEQUATE" CURATIVE PSYCHIATRIC TREATMENT FOR THE CLASS PRESENTS A JUSTICIABLE CONTROVERSY.

If something is to be elevated to the level of a constitutional requirement, it would seem useful to first see whether we can determine what the "something" is. Indeed if it is not capable of being identified with such reasonable precision as would permit the imposition of judicially ascertainable and management standards, claims of its deprivation are "nonjusticiable." See, *e.g. Powell v. McCormack*, 395 U.S. 486, 516-517 (1969); *Baker v. Carr*, 369 U.S. 186, 196 (1962). To start with, it must be remembered that the claims asserted in the present case do not deal with those more readily ascertainable *physical* standards incidental to reasonable custodial care (*e.g.* adequate shelter, diet, sanitation and medical care). We are here concerned with the claim of a right to some unspecified measure to therapeutic *psychiatric* treatment above and beyond reasonable custodial care (treatment which currently involves the use of a multidisciplinary staff, apt to include music therapists, occupational and recreational therapists, social workers, clinically trained chaplains, psychiatrists and psychologists as well as individuals involved in those disciplines and services associated with normal custodial care). The differences between the two situations are considerable.[15]

[15]We do not dispute, for example, that the sort of *physical* health and safety hazards which the district court found to exist in Ala-

Respondents say in their complaint that they are entitled to "adequate and effective treatment", and to "constitutionally adequate diagnosis, care and treatment" [A. 8-9]. But what does this mean? Any decree giving relief in the exact terms Respondents request (i.e. ordering defendants "to provide constitutionally adequate treatment" [A. 8]) would almost certainly be a complete nullity. The unraveled mystery as to how one would ever know whether he was in compliance with or in contempt of such an order would result in its being violative of that minimum level of specificity necessary to the grant of valid injunctive relief and "due process."

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bama's institutions in *Wyatt* (*e.g.* inadequate food, filth and insect infestation) may well be amenable to federal judicial relief under the Eighth Amendment, although even here we think that any remedy should be in the alternative, requiring the State to *either* close the facility *or* to eliminate the conditions found to be hazardous to the life and limb of the patients. The distinction between this sort of judicial remedy for serious physical deficiencies in basic custodial care and judicial attempts to resolve questions on the measure of curative treatment for the mentally disabled was recognized in *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973), where it was concluded that mentally retarded persons in state institutions did have a right to reasonable "protection from harm" but did not have a "right to treatment." Indeed the district judge in the case at bar has clearly demonstrated his recognition of the difference between this necessity of protecting the physical health and safety of confined individuals and attempting to review will-o'-the-wisp standards of curative psychiatric treatment. Only three months before his dismissal of Respondents' complaint in the present case he found the physical conditions of a county jail to be so deplorable as be violative of the Eighth Amendment, and did not hesitate to order (1) that any further usage of the facility was to be conditioned upon immediate remedial action, (2) that not more than 20 persons were to be confined in the jail, and these solely on the ground floor, and (3) that since the age of the facility made fully adequate renovation economically unfeasible, it was not to be used to house any prisoners at all after January 1, 1973. See *Hodge v. Dodd*, ___F.Supp___, (N.D. Ga., No. 16171, decided May 2, 1972).

Nor has the United States Court of Appeals for the Fifth Circuit clarified the matter with its pronouncement that the United States Constitution gives persons civilly committed to state mental institutions a federally enforceable right:

> ". . . to such individual treatment as will help each of them to be cured or to improve his or her mental condition." *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974) [Appendix p. 32a]; see also *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974).

Quite aside from the anomaly of constitutionally requiring that which is beyond the present power of medical science to give,[16] this holding does not even begin to answer the

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[16]The unpleasant but plain truth of the matter is that mental illness is in many cases irreversible, with little or no chance for either "cure" or "improvement." It is generally thought, for example, that damaged or destroyed brain cells do not regenerate. Some mental illnesses or disabilities are apt to be associated with organic brain damage (*e.g.* senile dementia) and hence not susceptible of curative treatment. And even as to mental illness not associated with organic brain damage the rate of cure ranges from rather low (*e.g.* schizophrenia) to reasonably high (*e.g.* manic-depressive psychosis). Thus in a substantial number of cases proper custodial care is all that reasonably can or should be required. As Dr. Dale C. Cameron, former superintendent of St. Elizabeth's Hospital in Washington, D.C., has observed:

> "Many persons appear to naively and uncritically believe that full recovery should be the treatment objective for all mentally ill patients. While no one would disagree with this belief as a philosophical ideal, it is unfortunately true that, given our present state of knowledge, there are some patients for whom such a goal is not more realistic than is the expectation for the regrowth of an amputated limb." *Symposium: The Right to Treatment*, 57 Georgetown L.J. 673, 729-30 (1969).

The American Psychiatric Association has similarly concluded that:

> ". . . it is unsound to dismiss a procedure as 'purely custodial' or 'purely punishing' without assessing the total circumstances

basic question of what constitutes "treatment." Much less does it give us the slightest hint as to how we are to know whether enough of it is being given.

In attempting to more precisely define "treatment" we find little in the dictionary which would be of any help to a court seeking to "judicially identify" the duty asserted, or to "judicially define" what a breach of the duty would be (see *Baker v. Carr, supra* at p. 198). Webster's Third New International Dictionary (unabridged 1961) includes the following among its definitions of the word "treatment":

> "1: the action or manner of treating as:
> a: conduct or behavior towards another party . . . b: the action or manner of treating a patient medically or surgically."

Looking next to the experts in the field of mental illness for help, we find that aside from the frequent use of other words for the same thing ("therapy" as to the treatment of disease generally or "psychotherapy" with specific reference to the treatment of mental illness), the matter becomes no clearer. Our hopes for even minimal justiciable specificity are indeed rather rudely dashed by the experts. Dr. Thomas S. Szasz, Professor of Psychiatry, State University of New York, Upstate Medical Center, Syracuse, New York, puts his finger on the critical weakness of any court imposed method or standard of treatment of the mentally ill in his article "The Right to Psychiatric Treatment: Rhetoric and Reality", 57 Georgetown Law Journal, 740, 741 (1969), as follows:

"Levine [M. Levine, Psychotherapy in Medical Prac-

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in which it has been prescribed." See 123 American J. Psychiatry, *Position Statement on the Question of Adequacy of Treatment*, pp. 1458, 1459 (1967).

tice 17-19 (1942)] lists 40 methods of psychotherapy. Among these, he includes physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs, and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs and electricity, and brain surgery. *Obviously, the term 'psychiatric treatment' covers every thing that may be done under medical auspices — and more.*

If mental treatment is all the things Levine and others tell us it is, how are we to determine whether or not patients in mental hospitals receive adequate amounts of it? Surely, many of them are already being treated with large doses of 'authoritative firmness', with 'ignoring of symptoms', and, certainly with 'satisfaction of neurotic needs'. This last therapeutic agent has particularly sinister possibilities for offenders. Psychoanalysts have long maintained that many criminals commit antisocial acts out of a sense of guilt. What they 'neurotically' crave is punishment. By this reasoning, indefinite incarceration might itself be regarded as psychiatric treatment." (italics added).

The seemingly infinite variety of opinions on how to care for and treat the mentally disabled has not escaped judicial observation. In *United States v. Klein,* 325 F.2d 283, 286 (2d Cir. 1963) a court noted that:

"Courts of law, unschooled in the intricacies of what may be the most perplexing of medical sciences, are ill-equipped to choose among such divergent but responsible views."

And in *Greenwood v. United States,* 350 U.S. 366, 375

(1956), this Court, after reviewing the testimony of two court-appointed psychiatrists commented that:

> ". . . their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ."

We would suggest that with the term "treatment" being as uncertain as it is in the field of psychiatry, its qualification by the word "adequate" only compounds the confusion. How can it be determined whether there is an adequate amount of something when the something is itself incapable of definition?

We do not overlook the fact that in taking note of this question the court of appeals, in *Wyatt v. Aderholt*, __F.2d__, (5th Cir. No. 72-2634, decided Nov. 8, 1974), pointed to the fact that in that case the plaintiffs and the defendant Alabama health officials were able to reach substantial agreement in developing standards. [Appendix, p. 37a]. This may well be a possibility in situations where the "defendant" health officials of a state, to put it charitably, consider a judicially compelled increase in their share of the state's budget to be something less than an unmitigated disaster. We rather suspect that any such agreement on standards would be not nearly so likely in a true adversary proceeding.

In the case at bar we wholly disagree with Respondents' view (among others) that questions about the adequacy of curative psychiatric treatment can properly be considered by a court a class basis. Respondents claim to speak for a class broadly composed of all mentally disabled persons committed to any one of six named mental

institutions of the State of Georgia, regardless of the nature of the particular affliction of each individual member of the alleged class. Yet surely everyone recognizes that what might be good treatment for one patient might be bad or even fatal for another. The concept of imposing uniform standards of psychiatric treatment for the entire class really seems to run into Respondents' other argument (with which we fully agree) that psychiatric treatment must be "individualized." *Cf. Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1343 (N.D. Ga. 1972). Some mentally disabled persons have need of the services of a psychiatrist frequently, while others might need his services rarely if ever. This also applies to the other disciplines currently used in the "team" approach to the treatment of mental illness.

It is at this point that the staffing requirements imposed by the district court in *Wyatt*[17] break down. What constitutes and effective staff-patient ratio for any given discipline depends upon a large number of variables. In a situation where such ratios are legally fixed standards whose modification would require a court order, the delivery of psychiatric treatment designed to meet an *individual* needs is for a number of reasons more apt to be hindered than helped. Since patient needs are highly individual, it also seems self-evident that differing institutions could be expected to have differing staffs depending upon the categories of patients treated. Obviously the differing schools of thought as to which treatment procedures are most effective would also be critical. Should the courts favor the staffing ideas of one group of psychiatrists over the ideas of another group of psychiatrists

[17]344 F. Supp. 373, 383 (N.D. Ala. 1972).

having differing views? Changes in technology and in the availability of particular disciplines are also important. To illustrate, because of the fact that registered nurses are simply not available in the numbers needed, many hospitals have come to rely heavily on licensed practical nurses.

As we see it, the freezing of any particular staffing standard into law would place the practice of psychiatry itself in a strait jacket, quite likely to the ultimate detriment of those very persons who Respondents assert they are attempting to aid.[18] The art of treating mental illness is permeated with disputes and disagreements in all of its aspects, including matters of staffing and treatment procedures. It is also an area of change, growth, and hopefully continued improvement. We respectfully submit that in the case at bar the district court was most perceptive in recognizing the inherent danger of judges engaging in the unlicensed practice of psychiatry. Quite aside from the fact that such an "unlicensed practice" could quickly become "malpractice" if amendments to the sort of judicial supervisory decrees contemplated by Respondents do not keep up with developments in psychiatric treatment, there is the very real danger of both wasting public moneys and throttling progress if psychiatry is to be frozen to

[18]Our criticism of a judicial imposition of fixed staffing requirements as a legal standard is by no means prompted by a concern over existing staff-patient ratios in Georgia. Dr. Birnbaum, in his Statement of November 4, 1969, before the Subcommittee on Constitutional Rights, Committee on the Judiciary, *"The Right to Treatment—Some Comments on Certain Legal Developments"*, refers, for example, to physician-patient ratios of 1 to 500 in New York and 1 to 1,000 in Florida. If Respondents had taken the trouble to look into the situation in Georgia before filing their suit they would have found that the state's most overcrowded facility for the treatment of mental illness, Central State Hospital at Milledgeville, the ratio was an entirely acceptably 1 physician to 75 patients.

standards which even if arguably beneficial today would almost certainly be inconsistent with the highest level of the practice of the art tomorrow. Thus the district court concluded that:

> "In attempting to grapple with issues beyond the pale of judicial definition and resolution the Court renders a disservice to the community and stifles the needed creative and imaginative efforts of its concerned individual citizens." *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1343 (N.D. Ga. 1972).

We think that the controversy presented by the case at bar is nonjusticiable, and that the district court was correct in so holding. The implications of the court of appeals' reversal are for reasons already stated great indeed, and would appear to merit this Honorable Court's review of the matter.

CONCLUSION

Any individual having a bona-fide complaint over his treatment in Georgia's mental institutions is possessed of a number of adequate state legal remedies. In addition to those set forth in the mental health act itself which reach to any and all aspects of his *individual* treatment, see Ga. Code Ann. § 88-502.11, medical malpractice suits are also well recognized in Georgia, see Ga. Code Ann. § 84-924, not to mention ordinary tort action where injury results from a breach of a duty of care. The district court concluded that for this reason too Respondents' case was subject to dismissal. *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1343 (N.D. Ga. 1972). We would submit that at the very least this existence of such adequate state legal remedies is yet

an additional reason for federal courts to avoid the new trail of constitutional law which Respondents and the United States Court of Appeals for the Fifth Circuit would *blaze*. For all of the reasons stated herein we think that the issues raised in this case are significant constitutional questions and of sufficiently vital importance to our federal system to justify this Honorable Court's issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Exec. Assistant Attorney General

DON A. LANGHAM
Assistant Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Asst. Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334
Phone: 404-656-3330